IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 22, 2005 Session

STATE OF TENNESSEE v. EVERETT J. DENNIS

Appeal from the Circuit Court for Marion County
No. 6776 Thomas W. Graham, Judge

No. M2005-00178-CCA-R3-CD - Filed March 21, 2006

The Appellant, Everett J. Dennis, appeals his conviction by a Marion County jury of driving a motor vehicle while his blood alcohol concentration was .08% or more. *See* T.C.A. § 55-10-401(a)(2) (2003). On appeal, he argues: (1) that the police stop of his vehicle is not supported by "probable cause or reasonable suspicion;" (2) that his sentence violates *Blakely v. Washington*; and (3) that his conviction under Tennessee Code Annotated section 55-10-401(a)(2), driving under the influence *per se*, is unconstitutional because it violates due process. After review, the conviction and sentence are affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Paul D. Cross, Monteagle, Tennessee, for the Appellant, Everett J. Dennis.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Sherry D. Gouger, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The following facts were developed at the evidentiary hearing on the motion to suppress:

At approximately 7:55 p.m. on the evening of October 11, 2003, Officer Donald Dykes of the Monteagle Police Department received a radio dispatch from the neighboring Sewanee Police Department to be on the lookout for "a black SUV Jeep, Florida tag [419 UAK] heading toward Monteagle weaving all over the roadway." Officer Dykes proceeded south on Highway 41 to intercept the reported vehicle, which, according to the dispatch, would be traveling in a northerly direction into Monteagle. Within two or three minutes, Officer Dykes spotted a gray Jeep driving

below the 35 mph posted speed traveling toward Monteagle on Highway 41. A line of vehicles was "backed-up" behind the Jeep. The officer turned his patrol car around and activated the blue lights in order to get behind the Jeep. He was able to maneuver around four vehicles, but, when only one vehicle was separating the patrol car from the Appellant's vehicle, the Appellant turned into the parking lot of the Best Western Motel in Monteagle. Dykes deactivated the patrol car's blue lights and closely followed the Appellant's vehicle onto the motel parking lot. The Appellant pulled his vehicle into a parking space, with the vehicle coming to a brief stop. The Appellant then abruptly backed out of the space, narrowly missing the front of the patrol car which had stopped at the rear and side of the Appellant's vehicle. As the Appellant was backing up, the officer reactivated the blue lights, exited his car, and approached the Appellant's vehicle, which had pulled back into the parking space and stopped. Dykes noted that the Florida license plate on the vehicle matched the tag number provided by the radio log. The officer had difficulty getting the Appellant to respond upon approaching the vehicle. Subsequently, a field sobriety test was administered, which the Appellant failed. The Appellant refused a second and different test. Based upon an odor of alcohol about the Appellant, the failed sobriety test, the Appellant's demeanor, and his near miss of the patrol car, the Appellant was arrested for driving under the influence.

The record reflects that the Appellant was indicted based upon alternative theories of prosecution under the DUI statute. *See* T.C.A. § 55-10-401(a)(1), (2). In a pretrial motion, the Appellant moved to suppress "all evidence resulting from or traceable to the stop or encounter" based upon "a lack of probable cause or reasonable suspicion," which the trial court denied. The record contains a jury verdict form and judgment of conviction, which reflect that the Appellant was convicted of driving a motor vehicle while his blood alcohol was .08% or more in violation of Tennessee Code Annotated section 55-10-401(a)(2).[1]

Analysis

I. Motion to Suppress.

First, the Appellant challenges the trial court's denial of his motion to suppress. Preliminarily, we note that when a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues forming the basis of the appeal. *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). In this case, the Appellant has failed to include any portion of the record of the trial proceedings. Our supreme court in *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998), has held that the Tennessee Rules of Appellate Procedure

[1]The presentence report states that the blood alcohol analysis by the TBI crime lab indicated a blood alcohol concentration of .24%.

> contemplate that allegations of error should be evaluated in light of the entire record. Accordingly, we hold that in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial.

Accordingly, an appellate court, when evaluating the correctness of the trial court's ruling on the motion to suppress, is required not only to consider the evidence that was before the trial court at the hearing on the motion, but it should also consider the entire record, including evidence offered at trial. This is so because the evidence offered at trial may further explain, contradict, or present additional proof on the issue. Notwithstanding, we elect review of the motion to suppress, as no procedural challenge was made by the State to default review upon its merits.

In reviewing the issue on appeal, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996); *see also State v. Randolph*, 74 S.W.3d 330, 333 (Tenn. 2002). The prevailing party in the trial court is "entitled to strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Odom*, 928 S.W.2d at 23. Furthermore, "questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Id*. However, this court reviews the trial court's application of the law to the facts under a *de novo* standard of review without any deference to the determinations of the trial court. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001).

In order to stop a vehicle, a law enforcement officer must have either probable cause or reasonable suspicion supported by specific and articulable facts to believe that an offense has been or is about to be committed. *Randolph*, 74 S.W.3d at 334. Our supreme court in *State v. Yeargan*, 958 S.W.2d 626, 632 (Tenn. 1997) (citing *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990)) observed:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

In determining whether reasonable suspicion existed for the stop, a court must consider the totality of the circumstances. *State v. Binnette*, 33 S.W.3d 215, 218 (Tenn. 2000). Those circumstances include the personal observations of the police officer, information obtained from other officers and agencies, information obtained from citizens, and the pattern of operation of certain offenders. *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992). Additionally, the court must consider any rational inferences and deductions that a trained officer may draw from those circumstances. *Id*. Objective standards apply rather than the subjective beliefs of the officers making the stop. *State v. Norwood*, 938 S.W.2d 23, 25 (Tenn. Crim. App. 1996).

In denying the Appellant's motion to suppress, the trial court concluded:

> I think there's probable cause based on the circumstances that he observed. I'm not sure what the law is with regard to how much he can rely on what was told to him over the dispatch. But I do know common sense tells you that, you know, that if you have a call like that that somebody's been observed all over the road, you see something that is at least curious.
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> . . . .
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> A good officer would have reasonable suspicion - - -
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> . . . .
>
> [t]o at least make an inquiry.

"Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' [within the meaning of the Fourth Amendment] has occurred." *State v. Daniel*, 12 S.W.3d 420, 424 (Tenn. 2000) (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)).

The proof demonstrates that the Appellant was "seized" when the officer activated the blue lights following the Appellant's narrow miss of backing into the patrol car on the motel parking lot. At this point, the patrol car, with its blue lights on, was within feet of the Appellant's vehicle and partially blocking its exit from the parking space. Under these circumstances, a reasonable person would have believed that he or she was not free to leave. *Daniel*, 12 S.W.3d at 425 (citing *Florida v. Bostick*, 501 U.S. 429, 437, 111 S. Ct. 2382, 2387 (1991)). Considering the totality of the circumstances, we conclude that the officer's decision to make the investigatory stop was based upon reasonable suspicion supported by specific and articulable facts. The radio dispatch from the Sewanee Police Department reported that a black Jeep traveling toward Monteagle with a Florida license place and identified tag number "was weaving all over the roadway." A vehicle generally matching the description of the BOLO was observed within minutes of the dispatch traveling toward Monteagle. This same vehicle nearly impacted the officer's patrol car on the motel parking lot. We conclude these facts were sufficient to permit an investigative stop of the Appellant's vehicle.

II. Sentencing

Next, the Appellant contends that the trial court erred in ordering him to serve seven consecutive days in confinement, the minimum service required for a conviction of DUI *per se*. *See* T.C.A. § 55-10-403(a) (2003). Specifically, he asserts that the sentence violates *Blakely v. Washington* and *Apprendi v. New Jersey* in that the sentence is more than the minimum sentence of forty-eight hours required for a DUI conviction. First, *Blakely* has no impact on a trial court's sentencing determinations involving misdemeanor convictions because there is no presumptive

minimum for a misdemeanor sentence. *State v. Brenda Bowers*, No. E2004-01275-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Aug. 3, 2005). Moreover, the Appellant's argument has been rendered moot by our supreme court's decision in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), which held that *Blakely* had no application to Tennessee's 1989 Sentencing Reform Act. This issue is without merit.

III. Due Process/Double Jeopardy

Lastly, the Appellant contends that because he was acquitted of DUI, based on impairment, his conviction under the DUI *per se* statute violates due process. The Appellant was indicted for DUI on two separate and alternative theories: that he was driving while under the influence of alcohol or that he was driving with a blood alcohol concentration of .08%. *See* T.C.A. § 55-10-401(a)(1), (2). Specifically, the Appellant asserts that:

> no reasonable person could argue that the prohibition of driving with a blood alcohol level above a certain limit is an objective in and of itself. The [Appellant] . . . therefore stands convicted of violating the *per se* law, the object of which is to prohibit impaired driving, of which the [Appellant] was acquitted even though the jury had every right to consider his blood-alcohol content on the question of impairment.

Essentially, he is arguing that "the effect of the *per se* statute is to permit the State to convict a person who has established (or at least the State has failed to refute) his non-impaired status." This argument is misplaced.

Our legislature has provided two distinct means by which a person who drives while intoxicated may be prosecuted, thus, elevating the standards for driving on the public roadways to not only prohibit impaired driving but also to prohibit driving with a certain blood alcohol concentration. In 1996, recognizing the tragic consequences to the public inexcusably inflicted by the act of drinking and driving, our General Assembly amended our DUI statute to proscribe the conduct of driving (or being in physical control) of a motor driven vehicle "while . . . [t]he alcohol concentration in such person's blood or breath is ten hundredths of one percent (.10%) or more."[2] T.C.A. § 55-10-401(a)(2) (1997). Thus, the issue in a prosecution for DUI under the *per se* provisions of section (a)(2) is not whether the person is "under the influence," typically a subjective determination, but whether the person's blood or breath alcohol concentration while driving was eight hundredths of one percent (.08%) or more based upon reliable testing. Clearly, in view of the serious problems and public harms created by those who choose to drink and drive, the legislature has criminalized not only the act of driving under the influence but also driving with a blood alcohol concentration of .08% or more. This does not violate due process requirements. Our legislature is free to criminalize behavior which places other members of the public at risk. Contrary to the Appellant's assertion, a finding of guilt under the *per se* statute does not require a finding that the

[2] Our legislature has since reduced this percentage to .08%. T.C.A. § 55-10-401(a)(2).

Appellant was impaired. As such, the jury's acquittal of the Appellant on that charge has no effect on his instant conviction for DUI *per se*.

CONCLUSION

Based upon the foregoing, the Appellant's conviction and sentence are affirmed.

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DAVID G. HAYES, JUDGE